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# In the Supreme Court of the United States

OCTOBER TERM, 1926

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No. 279

FEDERAL TRADE COMMISSION

v.

AMERICAN TOBACCO COMPANY

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## BRIEF FOR PETITIONER

### OPINION BELOW

The opinion of the court below (Rec. 781) is reported in 9 Fed. (2d) 570.

### JURISDICTION

The judgment to be reviewed was entered October 27, 1925. (Rec. 805.) That was on a petition to the Circuit Court of Appeals for the Second Circuit to review and set aside an order of the Federal Trade Commission entered under authority of Section 5 of "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes." (Act of September 26, 1914, C. 211, 38 Stat. 717.) The jurisdiction of the court below was invoked under authority of Section 5 of that Act.

The jurisdiction of this court is invoked under Section 5 (paragraphs 4 and 5) of the Federal Trade Commission Act (38 Stat. 717), and under Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

The questions presented are as follows:

1. Is the Commission's finding that the American Tobacco Company agreed with the members of the Philadelphia Association to decline to sell its products to any jobber who did not maintain the prices agreed upon by the jobbers supported by evidence?
2. Was it lawful for the American Tobacco Company, with full knowledge of the illegal agreement of the jobbers to fix prices at which they would sell and to prevent jobbers who sold at less than these prices from getting the goods, actively to aid and abet the jobbers in making effective their illegal agreement?
3. Is it an unfair method of competition for the members of a jobbers' association to agree to fix prices at which they will sell and to prevent both members of the association and nonmembers who do not observe the agreed prices from procuring the goods?
4. Is it an unfair method of competition for a manufacturer to join with a jobbers' association in compelling its members to observe prices illegally agreed upon and in preventing jobbers who

do not observe the prices from procuring the manufacturer's goods?

5. Is it an unfair method of competition for jobbers to sell goods at prices satisfactory to themselves and which in the past have sustained their business, though such prices may be lower than those agreed upon by the members of an association of competing jobbers?

6. May a combination in restraint of interstate commerce in violation of the Sherman Act amount also to an unfair method of competition within the meaning of the Federal Trade Commission Act?

7. Must the Commission in each case allege in its complaint that a proceeding is to the interest of the public, introduce evidence to prove the allegation, and make a finding of fact that the proceeding is to the interest of the public as a condition precedent to entering a valid order to cease and desist under the statute?

8. Is it to the interest of the public to prevent jobbers from agreeing upon prices at which they will sell and from agreeing to prevent those who will not observe their prices from getting the goods, even though no evidence be adduced that the increased prices of the jobbers are passed on to the consumer through increased prices of the retailer?

#### STATEMENT OF THE CASE

The Federal Trade Commission, hereinafter referred to as the Commission, issued a complaint (Rec. p. 11) on May 29, 1922, against certain to-

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bacco wholesalers located in Philadelphia, Pennsylvania, and Camden, New Jersey, and two manufacturers of such commodities, namely, The American Tobacco Company and P. Lorillard Company. The complaint charged that the wholesalers and manufacturers were then and had been using unfair methods of competition in interstate commerce in violation of Section 5 of the Federal Trade Commission Act. Briefly stated, the complaint alleged that the wholesalers, who were organized into an unincorporated association called the "Wholesale Tobacco and Cigar Dealers Association of Philadelphia, Pennsylvania," were engaged in a price-fixing combination and conspiracy; that the manufacturers mentioned cooperated and conspired with the members of the association and participated in the maintenance of the price-fixing system; that as a part of the price-fixing system adopted and maintained by the jobbers they sought and secured the cooperation of the manufacturers in persuading and intimidating wholesalers in their territory and outside of their territory to maintain the prices fixed by the association, and that the manufacturers by circular letters and otherwise notified the trade in that territory that they would refuse to continue furnishing supplies of their products to such wholesalers as might not observe the prices fixed by the wholesalers; that the wholesalers on reporting to the manufacturers names of dealers sus-

pected of refusing to observe the association's prices, and on requesting the cooperation of the manufacturers, secured that cooperation, by which the manufacturers upon ascertaining that the reports were well founded refused to continue to sell to such offending wholesalers.

The Commission, after hearing argument on the testimony taken before its trial examiner, made its findings (Rec. p. 715) and entered an order on February 16, 1924, against the wholesalers and against The American Tobacco Company, requiring them and each of them to cease and desist from the use of the method of competition alleged in the complaint and set out in the findings (Rec. p. 723). On the same day the Commission dismissed the complaint as to P. Lorillard Company.

The order (Rec. p. 723) required the wholesalers to "cease and desist from fixing, enforcing and maintaining, and from enforcing and maintaining, by combination, agreement, or understanding among themselves or with or among any of them, or with any other wholesaler of cigarettes or other tobacco products, resale prices for cigarettes or other tobacco products dealt in by such respondents, or any of them, or by any other wholesaler of cigarettes or other tobacco products."

The order required The American Tobacco Company to "cease and desist from assisting and from agreeing to assist any of its dealer-customers in maintaining and enforcing in the resale of cigarettes and tobacco products manufactured by the

said The American Tobacco Company, resale prices for such cigarettes and other tobacco products, fixed by any such dealer-customer by agreement, understanding or combination with any other dealer-customer of said The American Tobacco Company."

The order (Rec. p. 723) required The American Tobacco Company and the other parties named therein to file with the Commission within sixty days after service of the order, a report in writing stating the manner and form in which the order had been conformed to. The wholesalers' reports filed in compliance therewith (Rec. pp. 727-738) stated that none of the matters, things, practices, and activities alleged in the complaint and found as facts in the opinion of the Commission of February 16, 1924, had been practiced since February, 1922. The American Tobacco Company applied to the Circuit Court of Appeals for the Second Circuit to review the Commission's proceeding, and to set aside the order to cease and desist. In due time, the case came on for argument and the court set the commission's order aside. (Rec. p. 805.)

At the time the Commission made its order, namely, February 16, 1924 (Rec. p. 723), there were pending before it for consideration other cases against The American Tobacco Company and P. Lorillard Company. These cases were of the same general nature as this case, except that the wholesalers involved were located in cities other than Philadelphia and Camden. One was against

The American Tobacco Company and wholesalers located in Cincinnati, Ohio, and neighboring places in Kentucky. Another was against P. Lorillard Company and the same wholesalers in Cincinnati, Ohio, and neighboring places in Kentucky. The Commission dismissed its complaint against The American Tobacco Company and those wholesalers, but made a finding as to the facts and issued an order to cease and desist against P. Lorillard Company and those wholesalers, February 29, 1924. (7 F. T. C. Decisions 351.)

No petition for review has ever been filed by P. Lorillard Company or any of the wholesalers proceeded against in that case, to set aside the order to cease and desist.

The scope of the assigned errors urged herein requires a rather thorough discussion of the record and of the opinion of the Court below. It may, therefore, be sufficient for the purpose of summarizing the record into a statement of the case to state that the proof is that the wholesalers organized themselves into an association styled as above and that by means of that organization fixed prices for selling tobaccos and cigarettes in their territory, which included Philadelphia and Camden, and the territory adjacent to both cities. This was done by fixing a discount of 8% from the list price at an association meeting on September 16, 1920. (Rec. p. 660.) On June 20, 1921, the wholesalers raised their prices by reducing the discount from

8% to 7%. (Commission Exhibits 4 and 5, Rec. pp. 669-670.) By way of explanation of this method of fixing prices it should be stated that the tobacco manufacturing companies issue list prices on their goods and make their own prices to customers based on a discount from these list prices. The jobbers use the same lists in reselling, and their agreement therefore to sell tobacco and cigarettes at 8% off the list fixed a uniform selling price.

Having agreed upon the prices to be charged by the members, the Association cast about for means of compelling members to observe the prices, of inducing and compelling those outside of the Association to become members and thus becoming parties to the agreement, and of inducing and compelling wholesalers located outside of Philadelphia and Camden, who might sell in the territory covered by the members of the Association to maintain the Association's prices. It was apparent that if the great tobacco manufacturing companies would join with the members of the Association, all of the ends of the Association would be accomplished. For if manufacturers would refuse to sell to price cutters or those who would not join the Association, price cutters and recalcitrants would either be compelled to maintain the Association's prices or to go out of business. Accordingly, negotiations were entered into by the Association with the American Tobacco Company for the pur-

pose of securing the assistance of that company in the Association's activities regarding price fixing. The Association sought and secured the cooperation of the American Tobacco Company in such persuasion and intimidation. (Rec. pp. 430-431.) Names of offending dealers were furnished to the American Tobacco Company requesting its assistance in the enforcement of its system of price fixing and The American Tobacco Company, upon receiving such information, proceeded to investigate and upon finding that an offending dealer was cutting prices refused to furnish the dealer with further supplies. (Rec. p. 383; Commission's Exhibit 16, Rec. p. 232.)

During the period of fixed prices, as set out hereinbefore, The American Tobacco Company issued circular letters to its wholesalers, which in effect signified that that company would cooperate in the maintenance of prices fixed by its jobbers in any given territory. This letter was also a veiled threat that the company would refuse to continue selling to any of its customers who would sell at prices less than those fixed by a majority of its customers in any given territory. (Rec. p. 672.) Of course, it applied to the Philadelphia and Camden territory.

Consequently in the period in which the Association adopted and maintained uniform resale prices for the products of The American Tobacco Company, it was the policy of that company to assist groups of its jobbers who would fix or who had fixed

by cooperation among themselves, uniform resale prices on its products, by refusing shipments of its goods to such jobbers as had resold or who would resell at prices lower than those fixed by such jobbers by agreement or cooperation among one another.

The American Tobacco Company knew of the Association's price agreements and expressly agreed with the Association to help its members to maintain those price agreements. (Rec. pp. 430-431.) The American Tobacco Company cut off from its direct list a price-cutting competitor of the members of the Association. This jobber, continuing to resell at prices in effect by him previous to the organization of the Association and refusing to comply with the direction of The American Tobacco Company that he join (Rec. p. 315), was removed from the list of distributors of the tobacco company for the purpose of assisting the Association to maintain its price agreements (Rec. p. 383). The American Tobacco Company removed from its list of customers another of its price-cutting jobbers for the purpose of assisting the Association in maintaining its fixed prices. (Commission's Exhibit No. 16, Rec. p. 232.) This jobber had been expelled from the Association for price cutting. (Rec. pp. 237-239.)

In addition to the assistance furnished by the tobacco company to the Association in the latter's price-fixing scheme, it also cooperated by way of withholding shipments of goods to two members of

the Association who were suspected of price cutting and who had been reported by officers of the Association to The American Tobacco Company as being suspected of having cut the Association's prices. (Rec. pp. 386-387.) The Circuit Court of Appeals in its opinion indicates that the finding of the Commission regarding the policy of The American Tobacco Company in supporting price-fixing organizations of its jobbers in various localities and regarding the application of that policy to its Philadelphia and Camden jobbers is justified from the record, for the Court says:

The policy of the wholesalers and jobbers was to fix a uniform price at which they would sell to the retailers, and they agreed to allow a certain trade discount of 7 or 8 per cent, as the case might be, from the manufacturers' list prices. And what the American Tobacco Company did was to refuse to sell its products to wholesalers or jobbers who, having bought its products at a price fixed by it, thereafter sold them to the retailers at a greater trade discount than the Wholesalers' Association had agreed upon. In other words, its policy was to *uphold and support the prices of its products as fixed in a particular locality by the wholesalers or jobbers therein.* (Italics ours.) (Rec. p. 797.)

The effect of the combination of the jobbers and of the tobacco company was to suppress and eliminate price competition both among members of the

association and nonmembers or, stated in another way, the effect of the combination was that it became an impossibility for a retailer located in Philadelphia or Camden territory to purchase cigarettes and tobaccos from any jobber, wherever located, at any price lower than that put into effect by the Association. (Rec. pp. 162, 156, 157, 198.)

There are, therefore, from the complaint and the facts, three main issues, as follows:

(1) Whether The American Tobacco Company expressly agreed with the Association to assist in the maintenance of its prices, or whether an agreement to that effect can be implied from the facts established.

(2) Whether, even though The American Tobacco Company did not agree to assist the association in maintaining the Association's prices, it cooperated with the Association for that purpose.

(3) Whether under the proof of an express agreement, an implied agreement, or cooperation between the Association and the Tobacco Company, a violation of Section 5 of the Federal Trade Commission Act is established.

The court below was of the opinion that the record did not establish an express agreement between the American Tobacco Company and the Association. (Rec. p. 795.) We urge, however, that the record does establish an express agreement, but that

if it does not, it does establish facts from which an agreement can properly be inferred. And, we urge that the record does establish beyond any question (and the court concedes this to be so, Rec. p. 797) that The American Tobacco Company actively co-operated with the Association for the purpose of assisting the Association in maintaining the prices which it fixed. Price maintenance, if accomplished by agreement, express or implied, or by cooperation, we contend to be an unfair method of competition.

The reasons for the contention regarding the law properly to be applied to the facts established by the record, as well as to the facts conceded by the court below to be established, are hereinafter set forth in the argument.

**SPECIFICATION OF THE ASSIGNED ERRORS INTENDED  
TO BE URGED**

In its petition for the writ of certiorari in this case, the Commission set out on page five thereof the questions presented by reason of the opinion of the court below. The assigned errors to be urged are that the court below erred—

(1) In holding that the Commission's finding that the American Tobacco Company agreed with the members of the Philadelphia Association to decline to sell its products to any jobber who did not maintain the prices agreed upon by the jobbers was not supported by the evidence.

(2) In holding that it was lawful for The American Tobacco Company, with full knowledge of the illegal agreement of the jobbers to fix prices at which they would sell and to prevent jobbers who sold at less than these prices from getting the goods, to aid and abet the jobbers in making effective their illegal agreements.

(3) In holding that it is not an unfair method of competition for the members of a jobbers' association to agree to fix prices at which they will sell and to prevent both members of the association and nonmembers who do not observe the agreed prices from procuring the goods from the manufacturer.

(4) In holding that it is not an unfair method of competition for a manufacturer to join with a jobbers' association in compelling its members to observe prices illegally agreed upon and in preventing jobbers who do not observe the prices from procuring the manufacturer's goods.

(5) In holding that it is an unfair method of competition for jobbers to sell goods at prices satisfactory to themselves and which in the past have sustained their business, though such prices may be lower than those agreed upon by the members of an association of competing jobbers or, conversely, in holding that it is fair competition for jobbers to combine to coerce competitors into charging prices which the jobbers have agreed upon as satisfactory to such jobbers.

(6) In holding that a combination in restraint of interstate commerce in violation of

the Sherman Act may not amount also to an unfair method of competition within the meaning of the Federal Trade Commission Act.

(7) In holding that the Commission in each case must introduce evidence to prove and must make a finding of fact that a proceeding by it under Section 5 of the Federal Trade Commission Act is to the interest of the public, as a condition precedent to a cease and desist order, or stated in another way, that the absence of a finding of fact by the Commission that a proceeding by it has been in the interest of the public invalidates the finding and the order predicated upon the finding.

(8) In holding that it is not to the interest of the public to enjoin jobbers from agreeing upon prices at which they will sell and to enjoin them from agreeing to prevent those who will not observe their prices from getting the goods, though no evidence be adduced that the increased prices of the jobbers are passed on to the consumer through increased prices of the retailer.

These errors specified will be discussed in the argument as these three main points:

(1) That the Commission's findings are supported by the testimony which establishes an express agreement between the Association and the tobacco company, or an implied agreement and cooperation between the tobacco company and the Association.

(2) That the complaint and findings set out an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

(3) That it is not necessary for the Commission to find as a fact that a proceeding instituted by it is in the interest of the public.

#### SUMMARY OF ARGUMENT

The issues of fact arising from the complaint and the answers present a matter of fact-finding for the Commission. There is proof of an express agreement between the Association and the Tobacco Company to assist the Association to enforce its fixed prices. This proof is based on the direct testimony of the president of the Tobacco Company on direct examination by counsel for the Commission. While it is true that on cross-examination by his own counsel he testified that he never consciously invited or cooperated in the making or carrying out of any agreements among jobbers or retailers that would limit their right to sell at prices which they pleased, the Commission based its finding of an agreement upon his direct testimony that he did enter into an agreement with the Association.

If the proof upon which we rely does not justify the finding of an express agreement, the conduct of the parties is sufficient basis for the Commission to infer an agreement.

Even in the absence of a finding of agreement, the order to cease and desist should stand, for the

court below concedes, as we understand its opinion, that for the purpose of assisting the Association in maintaining its price agreements the American Tobacco Company cut off two jobbers from its list of customers and suspended shipments to other jobbers. This is price fixing by cooperation and combination, and an agreement is not necessary to make this kind of a restraint upon interstate commerce unlawful under the Trade Commission Act.

The fact that the complaint charges and the record discloses a violation of the Sherman Act does not take the correction of the practice out of the jurisdiction of the Commission, nor does the fact that the prices fixed are those between wholesaler and retailer and do not extend from the retailer to the consumer make it any less unlawful than if they did extend to the prices charged by retailers to consumers, for the principle is the same.

The Commission's findings are not void from the fact that they do not state that the proceeding has been justified as being in the public interest; for a finding, such as the Commission made in this case, that the method of competition employed was prohibited by the act covers and includes the question of public interest, and therefore no specific finding on that question is necessary.

The opinion below is contrary to the doctrine laid down by this court in *Federal Trade Commission v. Beech-Nut Packing Company*, 257 U. S. 452. The opinion below has been criticized by the

Circuit Court of Appeals for the Sixth Circuit (*Toledo Pipe Threading Machine Company v. Federal Trade Commission*, 11 Fed. (2d) 337). The opinion below is in irreconcilable conflict with principles laid down in two other cases in two different Circuit Courts of Appeals (*Hills Brothers v. Federal Trade Commission*, 9 Fed. (2d) 481, and *Scalpar Company v. Federal Trade Commission*, 5 Fed. (2d) 574). Furthermore, in two cases in this Court, decided since the opinion below, doctrines are laid down which are at complete variance from the reasoning in the opinion below. These cases are *Federal Trade Commission v. Pacific States Paper Trade Association*, decided January 3, 1927, and *United States v. Trenton Pottery Company*, decided February 21, 1927.

#### ARGUMENT

##### I

**The Commission's findings are supported by testimony which establishes an express agreement between the Association and the Tobacco Company, or an implied agreement and cooperation between the Tobacco Company and the Association**

While the court below does not suggest that the findings as to the wholesalers are not supported, the effect of the agreement found by the Commission to have existed between the Association and the tobacco company, as well as the effect of the cooperation conceded by the court to have existed between the two may perhaps be better appreciated if we discuss the record in the following order:

(A) The Association, its agreements and its activities.

(B) The effect of the price agreements on competition in Philadelphia and vicinity.

(C) The connection of the American Tobacco Company with the price-fixing agreements of the Association, its general selling policy during the period involved and the application of that policy to the Association's activities.

(1) General policy.

(2) Proof of express agreement.

(D) The suspension of Charles Seider from the direct list of the American Tobacco Company.

(E) The suspension of Murphy Brothers from the direct list of the American Tobacco Company.

(F) The withholding of shipments to Fermani and Blumenthal.

(G) The evidence justifies finding of an implied agreement between the American Tobacco Company and the Association.

(H) The American Tobacco Company a conspirator.

(I) The dismissal of the complaint as to P. Lorillard Company, Incorporated, is not a reason for dismissing the complaint against the American Tobacco Company.

**(A) The Association, its agreements and its activities**

The Wholesale Tobacco & Cigar Dealers' Association of Philadelphia was formed on August 5, 1920, following an organization meeting held at the Hotel Adelphia in Philadelphia on July 22, 1920.

Among the objects of the Association, as shown by the constitution, is the following:

To correct any abuses as may exist in the conduct of the trade by its various members. (Rec. p. 666.)

The officers chosen at the first meeting were Nelson Eberbach, president; Harvey D. Narrigan, vice president; James Murphy, vice president; Herman J. Krull, treasurer; Paul L. Brogan, secretary.

The officers chosen at the organization meeting and the members of the committees named at the meeting on September 2, 1920, remained and continued such officers and committeemen until at least January 6, 1922 (Exhibits 1 and 2, Rec. pp. 658, 666), except that William Fink on June 6, 1921, was elected second vice president in place of James Murphy, of Murphy Brothers.

The membership of the Association comprised all of the wholesale tobacco and cigarette dealers in Philadelphia and Camden, excepting two, namely, Charles Seider and Fringes Sons. (Rec. p. 116.) The latter, Fringes Sons, seem to have been, according to the record, engaged chiefly in the manufacture and sale of cigars rather than of cigarettes and tobaccos.

On September 16, 1920, at a special meeting of the Association held at the Gladstone Apartments, the following report of the executive committee was adopted:

Your committee reports that at a meeting of the board of directors held September 2d,

it was unanimously resolved that the cash discounts on tobaccos and cigarettes be not more than 8%. (Commission Exhibit No. 1, Rec. p. 660.)

On December 6, 1920, at a regular monthly meeting of the Association the executive committee made the following report:

Your committee recommends that when gratis or other deals on cigarettes or tobacco are placed by the various companies, having a time limit, that immediately after the expiration of such time limit members will suspend the operation of the deal. Your committee also recommends that district agents of the various companies be permitted to pick up from the members their own products at list less 5%. The committee also made recommendation relative to prices on cigarettes and tobacco. (Commission's Exhibit No. 1, Rec. p. 661.)

The minutes show that the recommendations of the executive committee were adopted.

It has been the practice for a great number of years for tobacco manufacturers to sell to their direct customers, all of whom are wholesalers, on the basis of discounts from list prices fixed by the manufacturers. In 1921 and for many years prior thereto tobacco manufacturers, including The American Tobacco Company, allowed to their customers a discount of 10 per cent from the manufacturer's list prices, with an additional discount of 2 per cent for cash within 10 days. The jobber has always used

the manufacturer's list prices as the price basis of his resales to the subjobber and to the retailer; that is to say, while the jobber would buy at 10% discount from list price with an additional discount of 2 per cent for cash within 10 days, the jobber, in turn, resold to the retailer and to the subjobber on the basis of discounts from such list prices. The subjobber, in turn, resold to the retail trade also on the basis of discounts from the list price. The list price, as such, goes no further than to the retailer, because it is not the price intended to be charged by the retailer to the consumer.

The agreement as to discounts to be allowed the representatives of the tobacco manufacturing companies was called to the attention of those companies by the president of the Association. A letter written by Eberbach to P. F. O'Boyle (field sales manager) of The American Tobacco Company (Commission's Exhibit No. 7, Rec. pp. 670, 671) is as follows:

Please be advised that the best price we make to missionary men on your line and all other lines is a discount of 5%. This is the lowest price that our Association permits any jobber to make to factory representatives, and if you hear of any competing factory representative purchasing goods for less than this price, will you please advise the writer?

At a meeting held on February 7, 1921, Asbury Davis, of Baltimore, a member of the firm of F. A.

Davis & Sons, made a "very interesting and constructive address," for which he was given a vote of thanks. It is clear that the address must have had some relation to an arrangement made between the Association and the Baltimore tobacco jobbers, in view of the fact that, according to a letter written by A. B. Cunningham & Company, of which the president of the Association was a partner (Commission's Exhibit No. 6; Rec. p. 670), there was an agreement between Baltimore jobbers and the Philadelphia Association on discounts and prices for Delaware by means of which competition as to prices or discounts between Baltimore jobbers and Philadelphia jobbers was eliminated.

The working cooperation between Baltimore jobbers and the Association is shown by letters in evidence, particularly Exhibits 6, 8, and 9. (Rec., pp. 670, 671.) These letters show also that the president of the Association notified S. T. Banham & Son that if they did not discontinue cutting prices in Delaware the matter would be taken up with the American Tobacco Company to compel the cessation of price cutting against Baltimore jobbers in Delaware, as to which territory there was a price-fixing agreement between the members of the Association and the Baltimore jobbers.

The meeting of June 6, 1921, was preceded by a banquet, following which there was an election of officers. A resolution was adopted, which does not appear on the minutes, by which the rate of dis-

count was lowered from 8 per cent to 7 per cent, which, in effect, raised prices. Notices were sent to all of the members of the Association stating that effective June 20, 1921, the maximum trade discount would be 7 per cent. (Commission's Exhibits 4 and 5, Rec. pp. 669, 670.) Other notices of action by the Association were sent to its members. (Rec., p. 287; Exhibit 12, p. 674.)

At a meeting held on May 2, 1921, the executive committee was authorized to employ a special investigator at a salary not to exceed \$50 a week. (Commissioner's Exhibit 1; Rec. p. 663.) An investigator named John W. Kane was appointed at a salary of \$40 per week for the purpose of checking up the discounts allowed by members of the Association to see to it that the agreed discount of 8 per cent, and later of 7 per cent, was lived up to. (Rec., pp. 55, 65.) His duties were explained to him, and he was informed of the fact that a discount from list had been agreed upon by the Association. It was the duty of Kane to report to Eberbach, Krull, or Brogan the names of jobbers who might be found to be cutting prices. (Rec., p. 68.)

Of course the purpose for which the investigator was employed could not be accomplished if the members of the Association knew his identity. Consequently his identity was not divulged by those who employed him. The witness Narrigan, although a vice president of the Association, did not know the identity or name of the investigator employed by

the Association until he saw him on the witness stand in this case and heard his testimony. (Rec., p. 279.)

Among the firms who were reported by Kane to the executive committee for price cutting were Murphy Brothers, M. Blumenthal, V. Fermani, and Charles Seider, all of whom were purchasers from The American Tobacco Company. (Rec., pp. 80-82.) When these reports by Kane were made to the executive committee, they generally reported in turn the names of the price-cutting jobbers to the representatives of The American Tobacco Company, particularly O'Boyle and Spitzmiller. (Rec., pp. 86-87.)

The Association, through its president, endeavored to induce price-cutting jobbers to abide by the Association's prices. Murphy Brothers were visited at Camden, New Jersey by Eberbach and Krull, who remonstrated with them for cutting the Association's agreed discount. (Rec., pp. 216, 217.) At a dinner of the Association other members complained to Murphy Brothers about their price-cutting activities and endeavored to induce them to live up to the discounts fixed by the Association. (Rec., p. 218.)

Letters of The American Tobacco Company (Commission's Exhibits 17, 18, 19, and 20; Rec., pp. 221-223) show that the complaints made by the Association to The American Tobacco Company regarding the activities of Murphy Brothers were

welcome. On August 27, 1921 (Commission's Exhibit 17; Rec., p. 221), the sales manager of The American Tobacco Company wrote to the field sales manager informing him that Mr. Hill, vice president of The American Tobacco Company was very anxious to ascertain whether the information in his possession that Murphy Brothers were allowing 10 per cent off American Tobacco Company's list price to three Philadelphia firms was correct, and that any information which Mr. O'Boyle, field sales manager, would impart to Mr. Hill on that subject would be highly appreciated. This information was secured by O'Boyle for Mr. Hill. (Exhibit No. 19; Rec. p. 222.)

The American Tobacco Company in its cooperation (see pp. 55-58, *infra*) with the Association, discontinued the account of Murphy Brothers from September 2, 1921 (Commission's Exhibit 20; Rec., p. 223), until October 4, 1921 (Commission's Exhibit 21; Rec., p. 223).

Charles Seider (see pp. 52-55, *infra*) was cut off, in the words of O'Boyle (sometimes described in the record as field sales manager, other times as district sales manager, and at other times as division manager), for "selling merchants in Philadelphia at less than the price in effect here by this group of jobbers." (Rec., p. 383.) Shipments to V. Fermani and Blumenthal, other price-cutting jobbers, were also held up by the American Tobacco Company (Rec., pp. 386, 387), because

of the reports made to The American Tobacco Company by officers of the Association upon information furnished to them by the investigator, Kane.

The activities of the Association conclusively appear from the record to have been devoted to the regulation of prices in cooperation with the American Tobacco Company.

In our discussion regarding the cooperation of the American Tobacco Company with the Association's activities, we shall show how Eberbach, president, and Krull, treasurer of the Association went to New York, where they secured from Percival S. Hill, president of The American Tobacco Company, his promise of cooperation with the "satisfactory" condition brought about by the Association. (See *infra*, pp. 46-50.)

(B) The effect of the price agreements on competition in Philadelphia and vicinity

The record shows that prior to the price-fixing agreements of the jobbers they had been competing with one another in discounts and prices. (Rec., pp. 162, 127, 128; Com. Ex. 13; Rec. pp. 674, 675, 198.) When the price agreements went into effect price competition among the jobbers was eliminated. (Rec. pp. 162, 156, 157, 158, 127, 128, 129, 130.) This elimination of price competition was complete excepting from two jobbers, viz, Murphy Brothers, who were expelled from the Association, and Charles Seider, who had refused to join the Association.

Seider continued selling at the discounts which he had been allowing years prior to the organization of the Association. Murphy Brothers, however, while selling below the Association's prices, attempted to conceal the amount of discounts they were allowing by billing the goods at the Association's discounts but secretly allowing some concerns an additional discount. (Rec. p. 258.)

Up to the time the price-fixing arrangement was made by the jobbers there had existed for a great number of years in Philadelphia a class of tobacco merchants known as subjobbers. These subjobbers are called such because, while they sell tobaccos and cigarettes at wholesale, they do not buy directly from the tobacco-manufacturing companies, but buy from wholesalers who do buy directly from the manufacturers. These subjobbers resell to retailers and in many instances conduct a retail business as well as a wholesale business. From the nature and extent of his business, the subjobber naturally buys and handles larger quantities of cigarettes and tobaccos than does the ordinary retailer and for many years, due to that fact, he had been allowed in Philadelphia a discount greater than the discount being allowed by wholesalers to retailers. When the agreed discounts went into effect, they applied to subjobbers as well as to retailers, the practical operation and effect of which was to allow the subjobber no better price than was allowed to the retailer, from sales to whom the subjobber looked for his profit. Conse-

quently, the subjobber was eliminated. There was a great number of these subjobbers in Philadelphia. When they were eliminated from selling to the retailers, they organized an association of their own in order, if possible, to relieve the situation which the price-fixing agreement had placed them in.

On October 29, 1920 (Com. Ex. 13; Rec. pp. 674, 675) they addressed a letter to the president of the American Tobacco Company outlining the Philadelphia situation and calling the attention of the American Tobacco Company to the situation. They asked the president of the American Tobacco Company for help. The letter was not answered. (Rec. p. 190.) Thereupon the subjobbers, through the president of the Association which they had formed, took up the matter with the president of the Jobbers Association. They were not successful in getting from the Jobbers Association any better discount than the discount allowed by the Jobbers Association to retailers. (Rec. p. 190.) On April 2, 1921, the subjobbers association wrote the Jobbers Association asking for a correction of the existing conditions so that the subjobbers might continue in business. (Com. Ex. 14; Rec. pp. 675, 676.) This letter was read at a meeting of the Association held April 4, 1921, and it was referred to the executive committee of the Association. (Com. Ex. 1; Rec. p. 663.) The executive committee ignored the letter. (Rec. p. 95.)

It was shortly after this meeting of the Association that it raised its prices to the retail trade by

changing the discount from 8% to 7%. As a consequence of the combined action of the members of the Jobbers Association, acting through it, these sub-jobbers were wiped out of the jobbing business, and as a further consequence retailers, excepting in a very few instances, were deprived of the right of price competition from the jobbers. This result, it follows, was reflected in the prices allowed by retailers to consumers.

These price agreements totally destroyed competition as to price in the wholesaling of The American Tobacco Company's products.

The retailer of cigarettes and the like, being deprived of his right of price competition among the wholesalers, was less able to compete in price with other retailers, and all this had the effect of bringing about uniformity of price to that part of the general public represented by the consumers, who were deprived of the benefit of price competition among retailers.

(C) The connection of The American Tobacco Company with the price-fixing agreements of the Association, its general selling policy during the period involved, and the application of that policy to the Association's activities

#### 1. GENERAL POLICY

The price-fixing agreements of the Association could not have been maintained without the assistance of The American Tobacco Company, which did assist in their maintenance. There is a strong demand for the brands of cigarettes and tobaccos manufactured by The American Tobacco Company,

particularly in the territory covered by the members of the Association. (Rec. pp. 233-234.) The means by which The American Tobacco Company gave its assistance to price-fixing agreements such as those entered into by the jobbers in this case, was to threaten to remove and to remove from its list of direct buyers anyone who violated his agreement entered into with other wholesale dealers of The American Tobacco Company in his territory. The tobacco jobber, of course, appreciates this powerful weapon in the hands of a tobacco manufacturing company. Usually he will conduct his business in such a way as not to be cut off the direct list of the manufacturer.

There is clear proof that The American Tobacco Company continuously cooperated with its jobbers to maintain resale prices of its products fixed by groups of its jobbers. Its policy was to encourage price-fixing agreements and when price-fixing agreements had been entered into, to offer assistance in the maintenance of them by threatening such price fixers that if they did not live up to the terms of their agreement they would be removed from the direct list of the company. This method of doing business characterized the policy of the company, particularly during the year 1920, although in that period that policy was not avowed so openly as in June, 1921, when its circular No. 2783 (Com. Ex. 10, Rec. p. 672) was issued to the trade. This circular letter is a direct threat to

remove price-cutting jobbers from the list of direct buyers. The circular reads as follows:

CIRCULAR NO. 2783

THE AMERICAN TOBACCO COMPANY,  
INCORPORATED,  
111 Fifth Avenue,  
New York, June 29, 1921.

*To our jobbing customers:*

It is of the highest interest to this Company to maintain permanent means of distributing its brands of tobaccos and cigarettes by efficient and businesslike methods.

We can only expect to obtain and hold customers when it is possible for jobbers to sell our products profitably.

It is obvious that a jobber of our products who sells at prices which would not permit of the tobacco business itself being profitable taken by itself is a jobber who in the long run will be a detriment and not a benefit to our business as our customer.

Any jobber who sells our products without profit or with such a small profit that it will not benefit him to continue permanently in the tobacco jobbing business on such a margin of profit is not a distributor who can afford us a safe and permanent avenue of distribution, and, if by his persistent price cutting he discourages and destroys the interest in our brands with competing jobbers we may eventually be left without adequate means of thorough distribution in his locality.

For this reason we are convinced that for the future of our business we are bound to

prevent as far as we reasonably and lawfully may such demoralization in the trade so far as our products are concerned. This does not mean price maintenance, but it does mean that where a jobber is not interested in making a fair and reasonable profit on our brands and elects to sell our products, for motives of his own, at less than a living profit, we are forced to the conclusion that he is not sufficiently interested in our goods to make a desirable permanent customer and we shall feel at liberty to remove him from our list of direct customers.

We trust that this policy will have the approval of all customers who are concerned in making a livelihood out of the tobacco business.

Very respectfully,

THE AMERICAN TOBACCO COMPANY, INC.,  
 GEORGE W. HILL, *Vice President.*

This is the circular to which subparagraph E of paragraph 2 (Rec., p. 721) of the Commission's findings refers.

Assuming for the sake of argument that the circular on its face is within the law and that a manufacturer acting independently and alone may threaten to cut off and may cut off from its direct list such of its distributors as it pleases, the difficulty with this circular lay in the circumstances and purposes which prompted its issuance, in the construction placed upon the circular by the company and the trade, in the thoroughly planned method of carrying out the threats contained in

the circular, in determining what price cutting was not a benefit to the business of The American Tobacco Company, in determining what price cutting or what discounts discouraged the interests of competing jobbers in The American Tobacco Company's brands, and in the combinations which the circular invited and brought about between the Company and groups of its jobbers, because the terms of the circular could not have been carried out by The American Tobacco Company independently from groups of its jobbers.

From the record, we submit that, after all, the circular (conceding, for the sake of argument, that it may have been proper and legal on its face) was merely a part of a general plan or scheme openly to encourage jobbers into making price-fixing agreements and to offer assistance in the maintenance of such price-fixing agreements.

Various form letters gotten up by The American Tobacco Company for the purpose of answering communications from its jobbers with respect to the circular above quoted, and form letters used in connection with the policy announced by the circular confirm the argument we make. When a jobber would write to The American Tobacco Company commending it on the issuance of the circular, the company would send that jobber a form letter signed by Mr. Hill, vice president (Com. Ex. 33; Rec. pp. 682-683), which contained the following language:

It is not our purpose here to establish the price at which our merchandise is sold; that is a matter which rests entirely in the hands of our customers in any given community.

We have no hesitation, however, in assuring you that where a customary price prevails in a given community, we are entirely within our legal rights in removing from our direct list of customers any customer who by selling our merchandise at less than the prevailing price in that community, thereby destroys the interest of our customers as distributors of our product.

This letter spells combination, cooperation and conspiracy between The American Tobacco Company and groups of its jobbers.

Another form letter indicates the extent to which the activities of the company and the influence of the circular brought about the consummation of price-fixing agreements. This is Exhibit 35 and contains as its last two paragraphs, the paragraphs of the letter last above mentioned. The first two paragraphs, however, are (Rec. pp. 683, 684):

We are in receipt of your letter of ——— and are glad to note that you are interested in Circular No. 2783.

In response to your inquiry, we would state that we believe the list of direct accounts of this company is to-day "cleaner" than it has ever been in the history of the tobacco business. It is our policy here to only sell such legitimate jobbers who serve as

the trade in Philadelphia regarding the meaning of the circular (Rec., p. 389):

Q. What explanation did you make to the trade in Philadelphia regarding circular No. 2783, known as "Commission's Exhibit No. 10"?

A. I explained that our policy would be as follows: Wherever a group of jobbers were selling our merchandise at a price which returned them a satisfactory profit, we would discontinue from our list any jobber in that group who sold at a price under that which was the usual custom, and we would take from our list any jobber outside that group who came into that market and demoralized that condition.

Q. Did you make any explanation of this circular in so far as it might apply to jobbers who were not in your district and who might ship goods into Philadelphia to retailers?

A. Yes; I covered that.

Q. What do you mean, that the answer you just gave covered that situation?

A. Covered that situation; yes.

That the circular was merely the open avowal of a policy that had been previously carried out by the company is a conclusion that can not be escaped when certain correspondence of the officials of the Company is considered. On April 1, 1921, Henry B. Finch, of Minneapolis (Respondent's Exhibit No. 1; Rec., p. 699), in a letter to Mr. Percival Hill complaining about price cutting in Minnesota, asked whether manufacturers might not be willing

to use their good offices to bring about an adjustment that would reestablish regular discounts. This letter was answered by Mr. Hill on April 4th. (Respondent's Ex. 2; Rec., p. 700.) Mr. Hill suggested that The American Tobacco Company would be glad to do what it could to bring about the discontinuance of price cutting; that he did not know just how to go about it and would be glad to have a suggestion from Finch. Hill himself while professing not to know how to go about it, shows in his letter that he does, because he states:

It does seem to me that a conference among jobbers themselves would do more to correct an evil of this kind than any other one method.

Finch was not quite satisfied with this reply, and accordingly wrote him again on April 28, 1921 (Respondent's Exhibit 4; Rec., p. 701), asking whether The American Tobacco Company could assist in correcting the price-cutting situation. When this letter was received Mr. Hill was in Europe, and the letter was answered by Mr. George Hill, vice president of the Company. This letter shows clearly and distinctly the policy of the company in these words (Commission's Exhibit 32; Rec., p. 682):

\* \* \* We feel very definitely here that when jobbers have cooperated and have held such conferences as Mr. Hill has suggested, then the manufacturer can step in by refusing shipments or withholding orders from

the demoralizers, and thereby assist those legitimate jobbers who desire to make a profit. (Rec., p. 682.)

There can be no better expression or description of the attitude of The American Tobacco Company in 1920 and 1921 than those words from that exhibit. Here is a suggestion by The American Tobacco Company to jobbers to get together and fix prices; here are advice and encouragement; here are held out before the eyes of the jobbers the promise and offer of assistance without which price agreements upon the part of jobbers would not be entered into, and without which price agreements, if entered into, could not be maintained.

This, we contend, is price maintenance by combination of dealers and manufacturers condemned by this Court in *Federal Trade Commission v. Beech-Nut Packing Company* (257 U. S. 441, 452) in these words:

By these decisions it is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.

This letter (Exhibit 32) was shown to Field Sales Manager O'Boyle, who, in 1921, had charge of The American Tobacco Company's selling forces in the Philadelphia territory. He testified very frankly that the policy of The American Tobacco Company as shown in Exhibit 32 was the policy of the company in Philadelphia in 1921 (Rec., p. 382), that his instructions were to carry out that policy, and that he did carry it out (Rec., pp. 381-383.)

At the risk of obscuring the obvious meaning of his testimony by discussing it, we submit, however, that it signified cooperation between the Association and The American Tobacco Company, for we understand that "assistance" is synonymous with "cooperation." Therefore, the real purpose of The American Tobacco Company in discontinuing the accounts of price-cutting jobbers was not to protect its brands, but was to assist so-called legitimate jobbers in maintaining so-called customary discounts which they themselves had established or might establish by conferences, or, to be more accurate, by agreements. When the cooperation between The American Tobacco Company and the Association is understood in the light of this testimony and in the light of the explanation hereinbefore referred to, which O'Boyle made of the circular (Com. Ex. 10; Rec. p. 672), it meant that the products of The American Tobacco Company could not be bought, for resale in the territory of the members of the Association, at less than the As-

sociation's fixed prices, unless the jobber selling the goods at less than the Association's prices ran the risk of being cut off or suspended from the direct list of the Company.

In addition to the direct suggestions by the president and vice president, respectively, of The American Tobacco Company, made to the jobbers to hold price-fixing conferences, the sales manager, in Commission's Exhibit 44 (Rec. p. 688) made a similar suggestion in these words:

Replying to yours of the 2nd inst., I wish that in the future you would not arrange any meetings for your jobbers. *You should suggest to the jobbers that it is their duty to get together themselves.* (Italics ours.)

We paraphrase this letter in this style: "You tell the jobbers to agree upon prices and that we will help them to maintain them."

Long prior to the issuance of the circular there had existed cooperation between the Association and The American Tobacco Company. As early as October 29, 1920, by reason of a letter written by the Subjobbers Association of Philadelphia to the president of The American Tobacco Company, that company knew of the price agreements of the Association. (Rec. pp. 674, 675.) On March 19, 1921, The American Tobacco Company took occasion to signify its cooperation with the Association in a letter to a member of the firm of Murphy Brothers.

(Com. Ex. 22; Rec., p. 677.) This letter was written by Sales Manager Bevill:

I understand that, according to your association agreement, there are no recognized subjobbers in the city of Philadelphia, and I further understand that you treated all so-called subjobbers on exactly the same basis as you did the retail trade, considering them only in the sense of a retail merchant and sold according to your agreed price, at list less 8%.

If my understanding of this matter is correct and you will advise me that these so-called subjobbers were sold as retail merchants, on receipt of your advice I will be very glad to issue proper instructions to see that you are reimbursed for all such orders sold and delivered by you.

It does not seem that one can escape the conclusion that this letter means cooperation. It certainly is notice that if the Association's price and its regulations had not been lived up to The American Tobacco Company would have refused to reimburse the firm of Murphy Bros.

Although this letter (Com. Ex. 22; Rec. p. 677) on its face proves cooperation, the sales manager who wrote it attempted to deny that it indicated such cooperation or that cooperation was intended or that The American Tobacco Company cooperated with any association; whereupon he was confronted with other letters written by him, one of which (Com. Ex. 1, Nov. 28, 1922; Rec. p. 694)

was written on July 28, 1921, to J. C. Lindner of the Reid Tobacco Company and secretary of the Keystone Tobacco Jobbers' Association, in which it appears that following a complaint made to The American Tobacco Company against the Wirth Cigar Company of Canton, Pennsylvania, that that company was selling at discounts better than those allowed by the Keystone Association, after an investigation made by O'Boyle, The American Tobacco Company discontinued the account of Wirth Cigar Company. This paragraph appears in that letter:

I feel if we can all work together with that spirit of cooperation the future of all legitimate jobbers is assured, and I want you to know that I am ever ready to be of assistance and take action when called on to do so, always, of course, providing we have accurate evidence on which to work.

This sales manager was confronted with another letter which he wrote to the secretary of the Keystone Association apologizing because he and his secretary had overlooked the very important fact of advising him that the Scranton Tobacco Company had been reinstated on the direct list of The American Tobacco Company. This letter (Com. Ex. 3, November 28, 1922; Rec. p. 696) and Exhibit 1, November 28, 1922, were answered in one letter written August 4, 1921 (Com. Ex. 2, November 28, 1922; Rec. p. 695, 696), which shows that on the previous day the secretary of the Association discussed with

O'Boyle of The American Tobacco Company, the cutting off of Wirth Cigar Company. The letter shows that the secretary of the Association informed the sales manager of the American Tobacco Company that he knew Wirth well enough to know that if he gave his word to cooperate he would cooperate by applying for membership in the Keystone Association. The secretary of the Keystone Association, grateful, indeed, for the cutting off of the Wirth Cigar Company, indicates his expectation of the continuation of cooperation in these words:

\* \* \* By all working together we will get somewhere in the near future, and the quicker we can bring the arbitrary jobber to realize that all the larger manufacturers are with us, so long as we are on the right track, just that much quicker will all associations be able to do real work.

We have shown that the record proves from the testimony of Field Sales Manager O'Boyle, the highest representative in authority in immediate touch with the Philadelphia situation, and from the correspondence and testimony of Sales Manager Beville, O'Boyle's superior, that The American Tobacco Company cooperated with the Philadelphia Association; we have also shown from the correspondence of the president of The American Tobacco Company and from the correspondence of the vice president of The American Tobacco Com-

pany that this cooperation was in furtherance of a general policy. All of the testimony referred to and the correspondence, in addition to proving cooperation between the Company and the Association, indicate that that cooperation was in pursuance of an agreement between the Company and the Association. The record, moreover, goes beyond an indication of an agreement, for the testimony of President Hill hereinafter quoted, we submit, establishes beyond any question that he entered into an agreement with the Association to help it to maintain the discounts which it had fixed.

## 2. PROOF OF EXPRESS AGREEMENT

Upon the making of the agreements by the Association fixing discounts, its president and treasurer made a trip to New York for the purpose of securing the assistance of The American Tobacco Company in the maintenance of the Association's prices. At the conference which Eberbach and Krull, president and treasurer, respectively, of the Association, had with the president of The American Tobacco Company, there was a discussion about general trade conditions, particularly the discounts being allowed by the jobbing trade in Philadelphia. (Rec., p. 360.) Krull and Elerbach informed Hill that different jobbers were allowing different discounts. (Rec., p. 361.) By that expression Krull seems to have meant that certain distributors of The American Tobacco Company in Philadelphia were not living up to the agreement that had

been made, although Krull testified that he did not remember what particular jobbers were discussed in that connection. He testified that he would not say that they did not discuss the discounts being allowed by Seider, Murphy, and Fermani (Rec., pp. 361-362), nor would Krull say that Hill did not agree to assist the Association, nor would he say that neither he nor Eberbach did not ask Hill for the support of The American Tobacco Company. Eberbach testified, "We said so much I do not remember." (Rec., p. 116.) There is no doubt, however, as to what did take place at this interview, although an attempt was made by Eberbach to show that the purpose of the conference was to discuss a particular deal that was then being given by The American Tobacco Company. Perhaps these two gentlemen of the Association did on a certain trip to New York discuss with Hill the extent of a special deal, but Krull and Eberbach made two trips to New York, at one of which no deal was discussed. (Rec., p. 365.) Mr. Hill was examined about the substance of this interview he had with the president and treasurer of the Philadelphia Association. The following testimony of Mr. Hill clearly, we contend, establishes an agreement between Mr. Hill on behalf of The American Tobacco Company and the president and treasurer of the Association on behalf of the Association to help maintain the Association's discounts (Rec., pp. 430-431):

Q. Did you say, however, to Mr. Eberbach and to Mr. Krull, or to either of them, that

you would assist them and other Philadelphia jobbers so that they may be selling under a discount satisfactory to them?

A. I don't know just what form that took.

Q. Now, tell us what you did say to them?

A. I can not tell, of course, what I did say but I probably said that we would cooperate with the jobber, not being able to sell goods at a profit.

Q. And did you also tell him that you would cooperate with the jobber with respect to assisting the jobber in procuring the customary price that prevailed in Philadelphia?

A. I can't remember the conversation, because I don't remember when it occurred.

Q. We are trying to get the substance of the thing.

A. Well, the substance of my conversation to any jobber who came in would be that we would be glad to assist him in getting a profit.

Q. And after your circular (meaning circular 2783) and after your instructions were issued to your field men, did you tell jobbers who visited you that you would cooperate with them in seeing to it that they would be able to sell at the discounts prevailing in their territory?

A. I think the conversation usually took that form, that we would be glad to help you to maintain——

Q. The customary price?

A. No, the satisfactory condition.

• • • • •

Q. Now, to keep specifically as to Philadelphia, the maximum discount of 8% and later 7%, fixed in Philadelphia, was never opposed by you, was it?

A. As a matter of fact, the discount of 8% I know about; I never heard of the 7% being made effective, but I can not imagine anybody doing a jobbing business at a profit with a less profit than 4%.

Q. Well, you did not oppose the 8% maximum?

A. No, we did not oppose it; we had nothing to do with it.

Q. So that, in that respect, that maximum in Philadelphia was satisfactory to your company?

A. Yes, sir.

Q. So, continuing to be specific, did you not say to Mr. Eberbach or to Mr. Krull, or to either of them, that you would assist them, or cooperate with them in selling at a discount of not greater than 8%?

A. I certainly did not.

Q. What did you say?

A. The most—of course, I am not repeating recollection of a conversation—but the most that I said to either of those gentlemen, or anyone else, was that we would assist them in securing a satisfactory profit on the goods.

Q. Now the word "satisfactory" is the one word we seem to be at odds about; when you use the word "satisfactory" do you mean satisfactory to the jobber?

A. Satisfactory to The American Tobacco Company.

Q. What do you say as to the jobber?

A. If it is satisfactory to The American Tobacco Company, it is satisfactory to the jobber.

This testimony made it not only the right but the duty of the Commission to find as a fact:

Said American Tobacco Company knew of the price agreements made by the association and its members as described in paragraph two hereof and agreed with the said association and its members to help them maintain the price agreements described in paragraph two hereof. (Section 2 of paragraph three of findings, Rec., p. 722.)

The making of the agreement admitted by Mr. Hill on direct examination by counsel for the Commission was denied by him on cross-examination by counsel for The American Tobacco Company; and the court below, without mentioning this testimony calls attention in its opinion (Rec., p. 789) to the fact that Mr. Hill was asked upon cross-examination the following question:

Did you, as directing the policy of the American Tobacco Company, ever consciously invite or cooperate in, in the making or carrying out of any agreements among jobbers or retailers that would limit their right to sell your products for what they pleased? and that he was permitted, over objection, to answer "I never have."

There is, therefore, it is true, a conflict in the testimony. The Commission found as a fact that there was an agreement. This ~~fact~~<sup>finding</sup> we have shown is supported by competent proof, and the court below, either ignoring the competent and legal proof of an agreement, or resolving the conflict in the testimony in favor of The American Tobacco Company, found that there was no proof of an agreement.

This, we contend, the court below had no right to do. The statute provides:

The findings of the Commission as to the facts, if supported by testimony, shall be conclusive.

This finding, therefore, was conclusive upon the court below. It was the intention of Congress that the Commission should be the fact-finding body, and that the Circuit Court of Appeals should not interject its views of the facts where there is a conflict in the evidence.

This Court in *Federal Trade Commission v. Curtis Publishing Company*, 260 U. S. 568, 580, through Mr. Justice McReynolds, said:

Manifestly, the court must inquire whether the Commission's findings of fact are supported by evidence. If so supported, they are conclusive.

And, in a doubting opinion by Mr. Chief Justice Taft in that case, concurred in by Mr. Justice Brandeis, in discussing the conclusiveness of a finding

of fact by the Federal Trade Commission, the former said:

\* \* \* because I think it of high importance that we should scrupulously comply with the evident intention of Congress that the Federal Trade Commission be made the fact-finding body and that the Court should in its rulings preserve the Board's character as such and not interject its views of the facts where there is any conflict in the evidence.

**(D) The suspension of Charles Seider from the direct list of the American Tobacco Company**

We have hereinbefore shown that the association's investigator found that Charles Seider was allowing discounts greater than those fixed by the Association; that the investigator reported this fact to the Association; and that the Association reported the matter to The American Tobacco Company. (Rec. pp. 81-87.)

In April, 1921, the president and treasurer of the Association requested Seider to join the Association and abide by the discounts which it had fixed. (Rec. pp. 316-317.) He declined to join. He was advised by O'Boyle, field sales manager of the American Tobacco Company to join the Association. His son, Charles Seider, Jr., testified that the substance of O'Boyle's advice was this:

So far as I can recall, he spoke about the conditions that were existing at that time and asked whether we would not comply with the prices that were given out by the association. (Rec. p. 315.)

He declined to join the Association or to abide by its prices and continued selling at discounts which he had been allowing for many years prior to the organization of the Association. Thereupon his orders for goods were inspected by Mr. Hill. (Commission's Exhibit 24, Rec. p. 313.) His orders were not shipped (Commission's Exhibit 26, Rec. p. 679), whereupon he wrote to the company. He received an unsatisfactory reply. (Commission's Exhibit 25, Rec. p. 678.) He wrote again. (Commission's Exhibit 25, Rec. p. 678.) Then he sent his son, Charles Seider, Jr., to New York to ascertain, if possible, why his goods were not shipped. Charles Seider, Jr., was informed that he should see Mr. Bevill, sales manager, who was out of town. (Rec. p. 322.) Shortly after Charles Seider, Jr., returned to Philadelphia from New York, Field Sales Manager O'Boyle came into the Seider place of business and discussed with young Seider the delay in the shipments. O'Boyle advised him and his father to join the Association and stated that he thought it would help them in getting shipments. (Rec. p. 324.) On this advice, Seider saw the vice president of the Association and indicated his willingness to join the Association. Thereupon his goods were shipped by the American Tobacco Company. Seider did not receive any goods from The American Tobacco Company from April 20, 1921, to August 13, 1921. (Commission's Exhibit 26, Rec. p. 679.)

In allowing discounts greater than those fixed by the Association, Seider was not selling at a loss. (Rec. p. 310.) He is one of the oldest tobacco jobbers in Philadelphia, and had been buying from the largest manufacturers since 1876. (Rec. p. 295.) He had always paid promptly for his goods, and there was no question about his credit. (Rec. p. 342.) His account was discontinued according to the testimony of O'Boyle—

For selling merchandise in Philadelphia at less than the prices in effect here by this group of jobbers. (Rec. p. 383.)

This information was given to O'Boyle by an official or executive of The American Tobacco Company. (Rec. p. 383.)

The Commission found (Rec. p. 722) that The American Tobacco Company discontinued selling to Seider for the period from April 20, 1921, to August 13, 1921, for the purpose of assisting the Association and its members in maintaining its price agreements. The court below makes no specific mention of this finding, although its language, which follows, indicates that the finding is supported:

\* \* \* In other words, its (The American Tobacco Company's) policy was to uphold and support the prices of its products as fixed in a particular locality by the wholesalers or jobbers therein. (Name supplied.) (Rec. p. 797.)

This, we contend, is price maintenance by combination, therefore unlawful.

**(E) The suspension of Murphy Brothers from the direct list of the American Tobacco Company**

To some of their customers, Murphy Brothers allowed discounts greater than those fixed by the Association. They invoiced the goods at the prevailing Association discounts, however, but gave to such customers secret rebates. (Rec. p. 258.) This was found out by the Association's investigator. (Rec. pp. 68, 69, 78, 79.) As a result, the president of the Association remonstrated with Murphy Brothers. (Rec. pp. 216, 217.) This price-cutting activity of Murphy Brothers resulted in their being expelled from the Association. (Rec. pp. 237, 239.) The Association reported the matter to the American Tobacco Company. (Rec. pp. 81, 78.) The account of Murphy Brothers was discontinued by the American Tobacco Company for cutting the Association's prices or discounts. The discontinuance of the account followed a request in writing (Commission's Exhibit 17, Rec. p. 221), dated August 27, 1921, to Field Sales Manager O'Boyle to investigate reports that Murphy Brothers were sell at 10% from list to certain Philadelphia firms, and the report made August 29, 1921, to Vice President Hill. (Commission's Exhibit 19, p. 222.) In his letter of August 27, 1921 (Rec. p. 221), Sales Manager Bevill, after informing Sales Manager O'Boyle that the American Tobacco Company

had been advised that Murphy Brothers were selling certain Philadelphia firms at 10% from list, stated:

Mr. Hill is very anxious to ascertain whether or not this is so, and I would suggest any information you can immediately obtain and send to me will be very highly appreciated.

Commission's Exhibit 16 (Rec. p. 232) is the sales department work sheet of the American Tobacco Company for September 7, 1921, giving the names of new accounts and the names of accounts discontinued. The reasons for the discontinuance follow the names of the firms discontinued. Among the reasons given for discontinuance of the various accounts are the following: (1) Retailers; (2) Credit; (3) Inactive; (4) No cooperation; (5) Sales reasons; (6) Closed out.

As to Murphy Brothers, the following appears:

Murphy Brothers, Camden, N. J. (Sales Reasons).

This firm was cut off from the list of customers of the American Tobacco Company from September 2, 1921 (Commission's Exhibit 20, Rec. p. 223), until October 4, 1921 (Commission's Exhibit 21, Rec. p. 223), which latter date was about the time the Commission began the investigation upon which its complaint in the instant case is based.

The Commission found (Rec. p. 723) that The American Tobacco Company discontinued selling Murphy Brothers for the purpose of assisting the

association and its members in maintaining its price agreements. The court below makes no specific mention of this finding, although its language which follows indicates that the finding is supported:

\* \* \* In other words, its (The American Tobacco Company's) policy was to uphold and support the prices of its products as fixed in a particular locality by the wholesalers or jobbers therein. (Name supplied.) (Rec. p. 797.)

This, again we contend, is price maintenance by combination and therefore unlawful.

**(F) The withholding of shipments to Fermani and Blumenthal**

Among the names of the firms in addition to Seider and Murphy Bros. reported by Investigator Kane to the executive committee as selling to certain retailers were Blumenthal and Fermani. (Record, pp. 81, 82.) These names, in turn, were reported as we have hereinbefore shown, to O'Boyle, the representative of The American Tobacco Company. (Rec. p. 87.) Shipments by The American Tobacco Company on orders given by these firms were withheld for a period of time. (Rec. pp. 386-387.) The record does not show that the Association or The American Tobacco Company found out that the complaints against Blumenthal and Fermani were justified. Consequently they did not have the same degree of difficulty with their shipments as Seider and Murphy Brothers had with theirs. The record does show,

however, that both of these firms were suspected and accused of violating the Association's agreements, that they were investigated by the Association investigator, that complaints were made to O'Boyle, that their shipments were withheld for a time; and we submit that all of these things support the finding of the Commission as to Blumenthal and Fernani in paragraph 3 (Rec. p. 723) of the findings.

**(G) The evidence justifies finding of an implied agreement between The American Tobacco Company and the Association**

We have argued (*supra*, pp. 46-52) that the record establishes an express agreement between The American Tobacco Company and the Association. If that part of the record to which we referred (Rec. pp. 430-431) does not establish an express agreement, we submit that the record sustains the finding of an implied agreement, for it establishes —

(1) A visit to New York by the president and treasurer of the association, where they discussed with the president of The American Tobacco Company trade conditions in Philadelphia and Camden. (*Supra*, pp. 46-47.)

(2) That it was the policy of the American Tobacco Company to assist groups of its jobbers in maintaining discounts or prices fixed by such jobbers. (*Supra*, pp. 30-46.)

(3) The employment by the Association of an investigator to discover price cutters. (*Supra*, p. 24.)

(4) Reports by the investigator to the Association of price cutting. (Supra, p. 25.)

(5) Complaints by the Association to The American Tobacco Company based upon these reports. (Supra, p. 25.)

(6) Investigation by The American Tobacco Company of these complaints. (Supra, p. 25.)

(7) Action by The American Tobacco Company as a result of its investigation based upon complaints of the Association. (Supra, pp. 52-58.)

(8) Written threats by The American Tobacco Company to punish price cutters. (Supra, p. 32.)

(9) Requests by representatives of The American Tobacco Company to price cutters to join the Association and to maintain its prices. (Supra, p. 53.)

(10) Refusal by The American Tobacco Company to continue selling to Seider, a price cutter. (Supra, pp. 52-55.)

(11) Refusal by The American Tobacco Company to sell to Murphy Brothers, price cutters. (Supra, pp. 55-57.)

(12) Suspension of shipments to jobbers suspected of being price cutters. (Supra, p. 57.)

(13) Refusal of members of the Association to cut the Association's prices, for fear they would be removed by The American Tobacco Company from its list of distributors. (Rec. pp. 157, 158, 198.)

These things, we submit, justify the finding, by inference, of an agreement. The Commission, we believe, has a province similar to that of a jury,

and so the following language of this court, speaking through Mr. Justice McReynolds, in *Frey & Son, Inc., v. Cudahy Packing Company*, 256 U. S. 208, 210, has particular application:

It is unnecessary to repeat what we said in *United States v. Colgate & Co.*, and *United States v. Shrader's Son, Inc.* Apparently the former case was misapprehended. The latter opinion distinctly stated that the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances. Having regard to the course of dealing and all the pertinent facts disclosed by the present record, we think whether there existed an unlawful combination or agreement between the manufacturer or jobbers was a question for the jury to decide, and that the Circuit Court of Appeals erred when it held otherwise.

This court in *Eastern States Lumber Association v. United States*, 234 U. S. 600, 612, by Mr. Justice Day said:

But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other mem-

bers of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.

In *Federal Trade Commission v. Pacific States Paper Trade Association et al.*, supra, this court through Mr. Justice Butler said:

The weight to be given to the facts and circumstances admitted as well as the inferences reasonably to be drawn from them is for the Commission.

It would seem to follow that the weight to be given to the facts and circumstances proved, as well as the inferences reasonably to be drawn from them is also for the Commission, and that the finding by the Commission of an agreement between The American Tobacco Company and the Association is justified by inference, if not from direct proof.

(H) *The American Tobacco Company, a conspirator*

There is no suggestion by the court below that the members of the Association did not make the price fixing agreements charged. The court indicates that, if these agreements were in violation of law, the Sherman Anti-trust Act and not the Federal Trade Commission Act was violated. These agreements amounted to conspiracies in restraint of trade. The court below agrees with the finding of the Commission that The American Tobacco Company aided the Association in carrying out its fixed prices. The tobacco company is therefore as

much a conspirator as if it had participated in the original conspiracy.

In *Thomas v. United States*, 156 Fed. 897, 912, the Circuit Court of Appeals for the Eighth Circuit, through Judge Adams, stated:

It is earnestly contended that there was not sufficient evidence to connect defendant Taggart with the particular conspiracy charged in the indictment. While the proof does not connect him with the incipency of that conspiracy, it is claimed by the government that facts appear from which it may be reasonably inferred that he came into it after it was connected with full knowledge of its existence and character and with a purpose of furthering its design. If such are the facts, he was as much a conspirator as if he participated in its original formation. *United States v. Newton* (D. C.), 52 Fed. 280; *United States v. Barrett* (C. C.), 65 Fed. 62; *United States v. Cassidy* (D. C.), 67 Fed. 698. \* \* \*

This statement of the law in *Thomas v. United States*, 156 Fed. 897, 912, was cited with approval in *United Mine Workers v. Coronada Coal Company*, 258 Fed. 838; *Rudner v. United States*, 281 Fed. 520; *United States v. Olmstead*, 5 Fed. (2d) 714.

**(1) The dismissal of the complaint as to P. Lorillard Company, Incorporated, is not a reason for dismissing the complaint against the American Tobacco Company**

The court below intimated that because the Commission dismissed its complaint against P. Lorillard Company, Incorporated, it should have dismissed its complaint as to the American Tobacco Company. Our answer is that the Commission considered that the proof against P. Lorillard Company, Incorporated, was not so strong as the proof against The American Tobacco Company.

**The complaint and findings set out an unfair method of competition in violation of section 5 of the Federal Trade Commission Act**

**(A) Price fixing by agreement is an unfair method of competition**

The court below seems, from the language which it employed, to have been of the opinion that the complaint and the findings set out a violation of the Sherman law, but that the Federal Trade Commission does not have jurisdiction to enjoin it as an unfair method of competition. The court used the following language:

The question here is not whether what has been done by The American Tobacco Company constituted a restraint of interstate commerce contrary to the Sherman Law and therefore unlawful. The Federal Trade Commission is not clothed with jurisdiction to hear and determine that question in this proceeding, although clothed with a limited jurisdiction as respects alleged violations of antitrust acts, sections 6-10 of the Federal Trade Act. Its authority to make the order which it entered herein is restricted to matters of "unfair competition." (Rec. p. 803.)

The court seems to have confused unfair competition with unfair methods of competition. It did not apply the definition of unfair methods of competition as defined by this court in *Federal Trade Commission v. Grotz*, 253 U. S. 421, 427, in

which Mr. Justice McReynolds speaking for this Court said:

The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

We suppose that it is not necessary to argue that price fixing by agreement is in violation of the Sherman Antitrust Act; but the fact that it is a violation of the Sherman Antitrust Act, does not mean that it is not an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, for it has the result condemned by this court in its definition of unfair methods of competition in the Gratz case hereinabove mentioned.

The opinion of this court in *Federal Trade Commission v. Pacific States Paper Trade Association*, supra, settles the proposition that price fixing is a violation of Section 5 of the Federal Trade Commission Act. The Pacific States Paper Trade Association was a price-fixing organization composed of

wholesale paper dealers. These wholesalers fixed uniform prices at which paper should be sold to retailers in the territory in which the wholesalers did business. Just as the wholesale tobacco dealers in the instant case limited price competition among themselves, so did the members of the Pacific States Paper Trade Association limit competition as to price among themselves. In speaking of the price fixing by the Pacific States Paper Trade Association, this Court said through Mr. Justice Butler:

And, as the contracts between the wholesaler and retailer constitute a part of commerce among the States, the elimination of competition as to price by the application of the uniform prices fixed by the local associations was properly forbidden by the order of the commission.

It follows, we submit, from the opinion of this Court in the Pacific States Paper Trade Association case that price fixing by agreement of the members of the Philadelphia Tobacco Jobbers Association, acting through the association, is an unfair method of competition; that the agreement of the American Tobacco Company to help the association maintain fixed prices is an unfair method of competition; and that the Federal Trade Commission is clothed with jurisdiction to enter the order which it did enter requiring the members of the Association and the American Tobacco Company to cease and desist from using that method of competition.

**(B) Price maintenance by combination or cooperation is an unfair method of competition**

As we have hereinbefore pointed out, the court below said :

In other words, its policy (The American Tobacco Company's) was to uphold and support the prices of its products as fixed in a particular locality by the wholesalers or jobbers therein. (Name supplied.)

This, we take it, means price maintenance at least by combination or cooperation and price fixing by combination has been condemned by this court in cases arising under the Sherman Antitrust Act, and in the *Beech-Nut case*, 257 U. S. 441, which arose under the Federal Trade Commission Act.

In *Dr. Miles Medical Company v. John D. Park & Sons Co.*, 220 U. S. 373, 408, this court, speaking through Mr. Justice Hughes, declared :

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void.

In the *Beech-Nut case*, 257 U. S. 441, 452, this Court, speaking through Mr. Justice Day, referring to *United States v. Shrader's Sons, Inc.*, 252 U. S. 85; *United States v. Colgate & Co.*, 250 U. S. 300; *Dr. Miles Medical Company v. Park & Sons Co.*, 220 U. S. 373; and *Frey & Son v. Cudahy Packing Company*, 256 U. S. 208, stated :

By these decisions it is settled that in prosecutions under the Sherman Act a trader is

not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the Act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.

We submit that in the instant case The American Tobacco Company has gone beyond the exercise of its right simply to refuse to sell others, and that by agreement with the Philadelphia Association, express or implied, by combination with the association, express or implied, by active cooperation with it, it has hindered and obstructed the free and natural flow of commerce in the channels of interstate trade.

This Court, in the *Beech-Nut case*, sustained an order of the Federal Trade Commission entered against the Beech-Nut Packing Company to require it to cease and desist from maintaining resale prices in combination with its jobbers. The combination and cooperation between The American Tobacco Company and the Association certainly is no less than the combination and cooperation condemned in the *Beech-Nut case*.

The opinion of the court below has been criticized by the Circuit Court of Appeals for the Sixth Circuit in *Toledo Pipe Threading Machine Company v. Federal Trade Commission*, 11 Fed. (2d) 337,

where Judge Dennison, speaking for that Court, stated:

The two recent price-maintenance cases in the Second and Ninth Circuit Courts of Appeals (*American Tobacco Co. v. F. T. C.*, 9 F. (2d) 570, Oct. 20, 1925, and *Hills Bros. v. F. T. C.*, 9 F. (2d) 481, January 4, 1926), although distinguishable in details, appear to us fundamentally in conflict with each other. It would seem that the Tobacco Company and the Wholesale Association exercised a concert of action to constrain the price cutters, at least as much as did the petitioner, the Toledo Company, and its distributors in the present case. The discussion by Judge Rogers of the controlling decisions and principles would support the conclusion that the practices of the Toledo Company are lawful. In the *Hills Bros. Case*, the cooperation between petitioner and its customers was no more in kind, though probably greater in amount, than we have here, and the opinion of Judge Rudkin concludes that this kind of cooperation is the thing forbidden by the rule of the *Beech-Nut Case*.

Pointing out this conflict, the court declines to follow the reasoning of Judge Rogers and affirmed an order of the Commission similar in substance to the order of the Commission under discussion here.

In the *Hills Bros. case*, 9 Fed. (2d) 481, 485, the Circuit Court of Appeals for the Ninth Circuit,

speaking through Judge Rudkin, stated of the right of the petitioner:

In other words, what a person may lawfully do individually he may not always do lawfully by combination, or through cooperation with others, and without unduly prolonging the opinion, we will only say that it clearly appears from the testimony that the petitioner has in large measure succeeded in fixing and controlling the retail price of its coffee in interstate trade; that this result has been accomplished, not through individual effort alone, but by combination and through cooperation with its salesmen and customers, and that this latter element renders the method of competition unfair.

The application of the reasoning of this Court and of the other courts in the decisions we have cited, condemns the combination and cooperation between the American Tobacco Company and the Wholesale Tobacco and Cigar Dealers Association of Philadelphia as an unfair method of competition.

(C) *Alleged reasonableness of prices maintained by agreement or combination no defense*

The Commission in its findings did not concern itself with the question as to whether the prices fixed by the Association were reasonable. It considered that the question of the reasonableness or unreasonableness of the prices fixed by agreement or combination does not affect the illegality of the agreement or combination. That it was correct in this view is apparent from the decision of

this Court in *United States v. Trenton Potteries Co. et al.*, supra. That case came to this Court on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit. Mr. Justice Stone for this Court said:

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices.

The reasonable price fixed to-day may through economic and business changes become the unreasonable price of to-morrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed.

Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

Therefore, the Commission properly refrained from deciding whether the prices fixed in the instant case were reasonable or unreasonable.

(D) An agreement or combination fixing uniform prices on sales by wholesalers to retailers is illegal even though the prices on sales from retailers to consumers are not fixed by the agreement or combination

If, as in this case, prices from wholesalers to retailers are fixed by agreement or combination, retailers are deprived of their right of competition in purchasing and being thus deprived, it is obvious that their ability to compete with one another as to price is lessened. This the Commission found in this case in Paragraph Four of its findings that :

The aforesaid acts and things done by said respondents and each of them had the tendency and capacity to constrain all wholesale dealers doing business in the territory above mentioned to uniformly sell the aforesaid products to their dealer customers at the prices fixed by the Association and its members as hereinbefore set out and hence to hinder and suppress all competition in the wholesaling of said products in said territory, particularly among the members of the Association and further to *hinder and restrict competition between all retail dealers in said territory.* (Italics ours.) (R. 778.)

The court below, from the fact that the prices at which retailers should resell were not a part of the agreement or combination, distinguished the instant case from the *Beech-Nut Case*. The court states:

The *Beech-Nut case* differs radically from the instant case, in which as before remarked no attempt is made by the American Tobacco Company to compel retail dealers in its prod-

ucts to maintain a price fixed by it in a resale to consumers. (Rec. pp. 802-803.)

In *Sealpar Co. v. Federal Trade Commission*, 5 Fed. (2d) 574, the control of resale prices did not extend to the price charged by the retailer to the consumer. The Commission's order in that case was affirmed. That the distinction made by the court below between the *Beech-Nut case* and the instant case is not justified is pointed out in the *Sealpar* case in which Judge Woods, for the Circuit Court of Appeals for the Fourth Circuit, stated:

We see no escape from holding that the Commission was required to respond to these facts by making the order above recited. The facts are substantially the same as in *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, 42 S. Ct. 150, 66 L. Ed. 307, 19 A. L. R. 882, except in two particulars. In the case cited the effort to control prices extended to retailers while in this case it did not. This difference, of course, can not affect the principle. In the *Beech-Nut Case* the packages were so marked under a key number system as to enable the Beech-Nut Company's agents to trace to the seller goods sold at less than the fixed price. That, however, was only one of the means of throttling competition, and its absence here does not affect the illegality of the other means to that end condemned by the Supreme Court. As this means was not used in the present case, it was, of course, not enjoined by the Commission. As to those illegal means

condemned by the Supreme Court which were used to suppress competition, the Commission rightly adopted the precise language of the Supreme Court in making its order.

### III

**It is not necessary for the Commission to find as a fact that a proceeding instituted by it is in the interest of the public**

While not expressly stating it, the court below suggests that it is necessary for the Commission in order to enter a valid finding of facts to state in that finding that the proceeding has been justified as being in the public interest. The statute says:

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.

If the words "to the Commission" had been omitted there might have been room for the contention that the Commission's discretion in the matter was not absolute; but the insertion of these words ap-

pear beyond question to put absolute discretion in the Commission.

A recent decision in point is that of the Circuit Court of Appeals for the Ninth Circuit in *Hills Brothers v. Federal Trade Commission* (decided January 4, 1926), in which the Court said (9 Fed. (2d) 481, 484):

The complaint in this case recites that the commission, in filing the complaint and making the charges, was acting in the public interest, pursuant to the provisions of the Act of Congress; but there was no other or further finding upon that question, and because of the absence of such finding the petitioner contends that the order is erroneous and cannot be sustained.

We cannot agree with this contention. An examination of the statute shows very clearly that the question whether a proceeding by the commission in respect thereof would be to the interest of the public, like the question whether the commission has reason to believe that any person, partnership, or corporation has been or is using any unfair method of competition in commerce, is committed to the discretion of the commission, is to be determined by the commission before proceedings are instituted, and is not thereafter a subject of controversy either before the commission or before the court, except in so far as the question of public interest is necessarily involved in the merits of the case, and, if the Commission finds that the method of competition in question is prohibited by the act,

no other or further finding on the question of public interest is required. *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737.

The petitioner cites *John Bené & Cons v. Federal Trade Commission* (C. C. A.) 299 Fed. 468, in support of its contention, but the decision in that case was based on the testimony, not upon the absence of a finding that the proceeding was to the interest of the public. True, the court called attention to the fact that there was no finding to the effect that the proceeding was to the interest of the public; but we do not understand that the court intended to hold that such a finding was necessary. A finding that the method of competition employed was prohibited by the act covers and includes the question of public interest, and no specific finding on that question is requisite or necessary.

It is interesting to note also that decisions of the highest court of New York construing a statute of that State, almost identical in verbiage to the Trade Commission Act, fully support the Commission's contentions here, and in reason and logic are sound. The decisions referred to construe a provision of Sec. 1808 of the Code of Civil Procedure of New York (now Section 304 of the General Corporation Law) which provides:

Where the Attorney General has good reason to believe that an action can be maintained in behalf of the people of the state  
 • • • he must bring an action accordingly

or apply to a competent court for leave to bring an action, as the case requires, if, in his opinion, the public interests require that an action should be brought.

In *People v. Lowe* (117 N. Y. 174, 22 N. E.) the Court of Appeals of New York said, respecting the power of the Attorney General under this provision:

He is to determine in the first instance whether the public interests require an action to be brought; and he may act upon his determination, subject to no control.

Again in *People v. Ballard* (134 N. Y. 269, 32 N. E. 54, 59) the same court said, respecting this provision:

We think that the question as to what the public interests require is committed to the absolute discretion of the attorney general, and that it can not be made the subject of inquiry by the courts.

So to construe the Trade Commission Act is merely to authorize the Commission to determine whether it will proceed, and to remove the possibility that if it should determine not to proceed it may be compelled by mandamus to do so.

It is beyond question that public interest is sufficiently present in the case. For more than a century the courts have refused their aid to enforce combinations or agreements in restraint of trade. Congress in the Sherman law has denounced as unlawful contracts, combinations, and conspiracies in

restraint of interstate trade. In the Clayton Act and the Trade Commission Act it has gone further and prohibited methods which may have a dangerous tendency to hinder competition. It requires no argument therefore to establish public interest in the prevention of agreements and cooperation between manufacturers and dealers, the sole purpose of which, from the standpoint of the public, is to restrain trade.

#### CONCLUSION

The judgment of the court below should be reversed and the Commission's order affirmed in its entirety.

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○

*End*

